

**IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

AMERICAN STATES INSURANCE COMPANY,

Plaintiff,

v.

CIVIL ACTION NO. 2:05-0724

EUGENE A. MCKENZIE, d/b/a
THE MCKENZIE COMPANY,

Defendants.

MEMORANDUM OPINION AND ORDER

On September 2, 2005, Plaintiff filed this action seeking a declaratory judgment that there is no insurance coverage, and that it has no duty to defend D&P Construction, David Burdette, Pamela Loftus or Jason Powers in a lawsuit filed in Kanawha County by Defendant, Eugene McKenzie, d/b/a The McKenzie Company (McKenzie). Default judgment was entered against D&P Construction, David Burdette, Pamela Loftus and Jason Powers. Accordingly, McKenzie remains the only defendant to this action. Pending before the Court is Plaintiff's amended motion for summary judgment against Defendant McKenzie. (Doc. 38, 39). Defendant did not file a response.

Federal Rule of Civil Procedure 56(e) provides that "[i]f the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." A moving party is not automatically entitled to summary judgment, but rather, "the court...must review the motion, even if unopposed, and determine from what it has before it whether the moving party is entitled to summary judgment as a matter of law." *Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 416 (4th Cir. 1993).

Plaintiff's claim for declaratory relief seeks to establish its duties and obligations under an insurance contract to which McKenzie is not a party. Default judgment has already been entered against the other parties to the contract. The subject insurance contract has nothing to do with the rights or obligations of any party to the Kanawha County action brought by McKenzie. In this case, no material issue remains as to Plaintiff and Defendant McKenzie. Therefore, the Court finds that Plaintiff is entitled to summary judgment.

Accordingly, the Court **GRANTS** Plaintiff's motion for summary judgment. The Court **DIRECTS** the Clerk to send a certified copy of this Order to counsel of record and to the Defendants.

ENTER: April 10, 2006

A handwritten signature in black ink, appearing to read 'Robert C. Chambers', is written over a horizontal line.

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE